



CLAYTON VALLEY MINERALS, LLC

186 IBLA 1

Decided June 30, 2015



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

CLAYTON VALLEY MINERALS, LLC

IBLA 2013-163

Decided June 30, 2015

Appeal from a decision of the Deputy State Director, Minerals Management, Nevada State Office, Bureau of Land Management, denying, in part, a potassium prospecting permit application for public lands in northwestern Nevada. NVN-087015.

Decision set aside and case remanded; motion to participate as amicus curiae granted.

1. Administrative Procedure: Adjudication: Leases and Permits--Administrative Procedure: Burden of Proof

When exercising its discretion to deny an application where exploration operations authorized by the proposed prospecting permit are determined to be likely to materially interfere with other legitimate uses of the affected public lands, or otherwise be contrary to the public interest, BLM's decision must be rational and supported by the administrative record.

APPEARANCES: Paul T. Barnes, Jr., Manager, Clayton Valley Minerals, LLC, Las Vegas, Nevada, for appellant; Thomas P. Erwin, Esq., Reno, Nevada, for amicus curiae Western Lithium Corporation; John W. Steiger, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Clayton Valley Minerals, LLC (CVM), has appealed from an April 12, 2013, decision of the Deputy State Director, Minerals Management, Nevada State Office,

Bureau of Land Management (BLM), denying, in part, its potassium prospecting permit application (PPA), NVN-087015, for public lands in northwestern Nevada.¹

As discussed below, we find BLM has not adequately justified its determination to partially deny CVM's potassium PPA and, therefore, we will set aside the Deputy State Director's April 2013 decision and remand the case to BLM for reconsideration of the matter.

Background

On November 4, 2009, CVM filed the potassium PPA pursuant to Subchapter IX of the Mineral Leasing Act (MLA), 30 U.S.C. §§ 281-287 (2012), and its implementing regulations, 43 C.F.R. Part 3500.^{2,3} CVM hoped to engage in prospecting operations on 1,920 acres of public land situated in secs. 8, 9, and 16, T. 44 N., R. 35 E., Mount Diablo Meridian, Humboldt County, Nevada, in the Thacker Pass area of the Montana Mountains, between the Quinn River Valley and the Kings River Valley, within the McDermitt Caldera.⁴ The purpose of the application was to determine the existence and workability of deposits of potassium, with the aim of potentially obtaining a potassium preference right lease (PRL), which would authorize its exploitation of the potassium resource under Subchapter IX of the MLA.

¹ The Western Lithium Corporation (WLC), which currently owns unpatented mining claims within the limits of the public lands subject to CVM's PPA, requests permission, pursuant to 43 C.F.R. § 4.406(d), to participate in the pending appeal as an amicus curiae. For good cause shown, the request is granted.

² Included with the PPA was a qualifications statement, delineating how CVM was qualified to hold a permit, in accordance with 43 C.F.R. Subpart 3502. See 43 C.F.R. § 3505.13. BLM accepted the qualifications statement in an Apr. 7, 2010, decision.

³ CVM also filed seven other PPAs, NVN-087012 through NVN-087014 and NVN-87021 through NVN-087024, which encompass a total of 14,490.11 acres of public land in the vicinity of the public lands now at issue. These applications remain pending before BLM. See BLM Answer at 2.

⁴ The subject public lands fall under the jurisdiction of the Humboldt River (Nevada) Field Office (HRFO), Winnemucca District, BLM.

BLM reports that CVM's PPA encompasses public lands that have long been the subject of unpatented mining claims located by WLC or its predecessor-in-interest.⁵ See Letter to BLM from WLC, dated Sept. 21, 2012, at 1 ("The [mining claims] . . . contain[] a deposit of lithium-bearing ores commonly characterized as [h]ectorite clay"). Such claims have long afforded WLC "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations[.]" 30 U.S.C. § 26 (2012).

BLM notes that WLC has been conducting exploration operations on certain of its mining claims, under either a notice (NVN-083592 or NVN-089233) or a plan of operations (POp) (NVN-085255) pursuant to 43 C.F.R. Subpart 3809, since 2007.⁶ WLC states that, as a consequence of drilling more than 200 drill holes on the claim

⁵ The unpatented mining claims, which were part of the NEUTRON, BETA, BPE, and PCD Mill claim groups, were mostly located in 2005, but also in 2008, 2009, and 2010. See Mineral Evaluation Report (MER), dated Feb. 15, 2013, at 26 (Figure 8 (Dates of Activities Supporting Mineral Development)). Certain of the claims cover public lands in secs. 8, 9, and 16 of the subject township, encompassed by CVM's PPA. See BLM Map, CVM PPA NVN-087015 and WLC POp NVN-085255, dated Nov. 14, 2011; BLM List of Mining Claims by Section, Secs. 4-10, 15-18, T. 44 N., R. 35 E., dated Mar. 14, 2011.

⁶ The first 3809 Notice, which covered public lands situated in the S $\frac{1}{2}$ S $\frac{1}{2}$ N $\frac{1}{2}$ and S $\frac{1}{2}$ sec. 8, W $\frac{1}{2}$ sec. 9, and NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 16, was submitted on June 1, 2007, the second 3809 Notice, which covered public lands situated, *inter alia*, in the N $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 9, was submitted on Oct. 7, 2010, and the 3809 POp, which covered public lands situated, *inter alia*, in the S $\frac{1}{2}$ N $\frac{1}{2}$ and SE $\frac{1}{4}$ sec. 8 and W $\frac{1}{2}$ sec. 9, was submitted on May 30, 2008, and approved by BLM on Jan. 4, 2010. See MER at 4, 25 (Figure 7 (Existing and Proposed Permit Boundaries with Existing and Proposed Activities)), 26 (Figure 8); (MASS) Serial Register Page, NVN-089233, dated Mar. 4, 2014; (MASS) Serial Register Page, NVN-083592, dated Mar. 4, 2014; (MASS) Serial Register Page, NVN-085255, dated Mar. 4, 2014. The first 3809 Notice expired on Apr. 1, 2010. The second 3809 Notice, which proposed to disturb a total of 4.97 acres of public land, expired on Dec. 3, 2014. The 3809 POp, which originally proposed to disturb a total of 75 acres of public land, provided for a total of 146 drill holes and 2 trenches. BLM approved an amendment of the POp on June 17, 2011, decreasing the proposed disturbance to a total of 54.5 acres of public land.

area, over the period from 2007 through 2011, it has discovered commercially valuable deposits of lithium and hectorite.^{7,8} See Brief at 2-3.

WLC later submitted a POp, NVN-091547, pursuant to 43 C.F.R. Subpart 3809, proposing to engage in mining operations, to be known as the “Kings Valley Clay Mine,” for hectorite on certain of its mining claims, on October 5, 2012.⁹ WLC proposed to operate an open pit mine, together with an ore stockpile area, waste rock disposal areas, roads, and other ancillary facilities, disturbing a total of 98.96 acres of public land, over the course of 20 years. See Mineral Evaluation Report (MER) at 11; (MASS) Serial Register Page, NVN-091547, dated Mar. 4, 2014, at 1. Importantly, WLC stated that it would extract potassium as a necessary by-product of its hectorite mining operations, which mineral would then be owned by WLC. BLM has yet to approve the POp.

On September 13, 2010, CVM submitted an exploration plan, proposing to drill exploratory drill holes on public land encompassed by its eight PPAs, for the purpose of confirming the presence of potassium, and, in addition, defining the nature and grade of the mineralization. See 43 C.F.R. §§ 3505.40 and 3505.45. CVM stated, in the exploration plan, that the public lands encompassed by the eight PPAs generally consisted of volcanoclastic sedimentary rocks overlying granitic bedrock. See Exploration Plan at 1, 4. It noted that these sedimentary rocks were divided into three distinct stratigraphic units, with the lowest one-third, principally described as tuffaceous sandstone, which is found at an approximate depth of from 175 to 400 feet below the surface, containing the maximum potassium grades. See *id.* at 4, 5.

⁷ Lithium (Li) is a “soft, silvery-white metallic element [that] . . . [is] never found uncombined in nature.” A Dictionary of Mining, Mineral, and Related Terms, U.S. Bureau of Mines (1968), at 648. It is, generally speaking, a mineral locatable under the General Mining Laws of the United States, 30 U.S.C. §§ 21-54 (2012).

⁸ Hectorite is a “[m]agnesium-bearing bentonite [clay] . . . (Mg, Li)₆Si₈O₂₀(OH)₄[.]” A Dictionary of Mining, Mineral, and Related Terms, U.S. Bureau of Mines (1968), at 537. It is, generally speaking, a mineral locatable under the General Mining Laws of the United States, 30 U.S.C. §§ 21-54 (2012).

⁹ The 3809 POp covered public lands situated in the E½ sec. 8 and W½ sec. 9. See MER at 10, 25 (Figure 7); (MASS) Serial Register Page, NVN-091547, dated Mar. 4, 2014.

Following BLM's request for additional information, CVM submitted a revised exploration plan, including a plan for reclaiming the disturbed land, following the completion of drilling operations, and an estimate of reclamation costs, on December 29, 2010. The plan concentrated on drilling four exploratory drill holes on public land encompassed by the permit application now at issue.¹⁰ The plan was slightly revised on April 11, 2012, relocating two of the drill holes in order to avoid any conflict with anticipated mining operations for lithium, under a POp to be filed by WLC. The four drill holes are situated in relatively close proximity in secs. 8 and 9 of the subject township. The revised exploration plan stated that all of the drill holes would be drilled to the base of the potassium-bearing tuffaceous sandstone, at bedrock.¹¹ It further stated:

The drilling equipment shall consist of a truck-mounted wireline coring drill rig. . . . Each drill hole will be sited on a 60-foot by 60-foot drill pad connected to an existing roadway by a cleared and graded 15-foot wide roadway. The total length of roadways to be constructed is estimated at 8,962 feet. The total disturbed area is estimated at 3.4 acres[.][¹²]

Revised Exploration Plan, dated Dec. 2010, at 6. Drilling and sampling at each drill hole would take place over the course of 4 to 6 days, with an additional day allocated to set-up and tear-down. *See id.* at 12. The project, from road construction to regrading and reseeding drill sites and access roads, would be completed in a total of 10 weeks. *See id.* The plan detailed efforts to avoid or minimize any adverse impacts

¹⁰ CVM stated, in a Dec. 2, 2010, letter to BLM, that it intended to submit exploration plan(s) in the future with respect to the remaining permit applications “in phases determined by current success of exploration.”

¹¹ CVM later stated, in a May 6, 2011, letter to BLM, that it anticipated drilling to a depth of 600 feet. *See* BLM Notes of Oct. 17, 2012, Meeting at 2 (“Core [drilling] from surface to 600'; target is 400' to 600' depth”).

¹² The relocations of two of the drill holes increased the total surface disturbance to an estimated 3.95 acres, also increasing the total length of the newly-constructed roadways to an estimated 10,521 feet. *See* Revised Exploration Plan, dated April 2012, at 6.

to air and water quality, as well as other aspects of the environment. The plan was again slightly revised on May 9, 2012, in response to additional requests by BLM.¹³

BLM originally had stated it would defer acting on CVM's PPA until after it had received WLC's mining POP for lithium, which was expected to be forthcoming. However, it later notified CVM on June 13, 2012, that WLC had decided not to pursue a mining POP for lithium "in the near future." BLM Notes of June 13, 2012, Conference Call at unpaginated (unp.) 1. Such a POP has not been entirely abandoned. See Letter to BLM from WLC, dated Sept. 21, 2012, at 1; Letter to BLM from WLC, dated Jan. 28, 2013 (attached to WLC Brief), at 5 ("It has always been WLC's intent to extract the hectorite clays as part of the encompassing lithium operation. The Hectorite had initially been envisioned as a by-product of the lithium operation but recent economic conditions ha[ve] led WLC to decide on extracting the Hectorite clay prior to developing the lithium."). Indeed, WLC stated, in a September 21, 2012, letter to BLM, objecting to approval of the PPA, that the area of public lands encompassed by the PPA covered "lands on which WLC has identified and confirmed the existence of a lithium resource," through its exploration POP (NVN-085255).¹⁴ Letter to BLM, dated Sept. 21, 2012, at 1. However, to our knowledge, WLC has yet to resume its pursuit of a mining POP for lithium.

Before adjudicating CVM's PPA, BLM required CVM to submit a conceptual mine plan for review by BLM, along with the proposed exploration, pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2012), since BLM would be required to issue a PRL, authorizing mining, if the proposed exploration is successful, under 30 U.S.C. § 282 (2012). See *Uintah Mountain Club*, 116 IBLA 269, 270, 271-72 (1990). CVM submitted a description of its proposed exploration and mining operations, for NEPA review purposes, on September 24, 2012. It included a conceptual mine plan, since submission of an actual mine plan would only be required in conjunction with the filing of a PRL application. The description was revised and resubmitted on September 28, 2012.

¹³ BLM states that CVM submitted a final revision of its exploration plan "[o]n November 21, 2012[.]" Decision at 4. We find no evidence of such a submission. See (MASS) Serial Register Page, NVN-087015, dated Feb. 20, 2014.

¹⁴ In an Oct. 3, 2012, letter to BLM, WLC noted that its objection related to PPA NVN-087015, rather than PPA NVN-087012, therefore correcting its September 21 letter.

Given the shallow depth and extensive thickness of the mineralized zone, the conceptual mine plan stated that CVM expected to mine potassium ore, using open pit methods, to a depth of 600 feet over a 500-acre mine area, crush the mined material onsite, and transport the resulting product by truck or rail to potential markets.¹⁵ See Updated Kings Valley Potassium Mine Proposed Action at unp. 9-12; BLM Notes of Oct. 17, 2012, Meeting at 3. The mine plan estimated that 5,000 tons would be hauled from the mine site each day, resulting in a total annual production of 1.25 million tons.

WLC objected to CVM's PPA in three letters to BLM, dated September 21, and December 31, 2012, on the basis, *inter alia*, that CVM's proposed potassium exploration operations would interfere with WLC's proposed hectorite mining operations and, whether found in or underlying the lithium-bearing hectorite clay interval, the potassium does not exist in qualities and quantities that would support issuance of a PRL. See E-mail to District Manager, Winnemucca District, *et al.*, from T. Scott Murrellwright, Solid Minerals Program, Nevada State Office, dated Apr. 4, 2012 ("[BLM discussed possible meeting] to see if WLC and CVM could jointly explore the hectorite clay deposit area within the footprint of WLC's approved 3809 exploration [POp]. WLC maintained that they saw no advantage for them to meet with CVM because[,] based on their drilling data, they do not believe that a potassium deposit exists within the footprint of their exploration plan....a potassium deposit does not exist above, within or below the hectorite deposit."). It also indicated that the potassium in the lithium-bearing hectorite clay interval targeted by WLC was, in fact, not leasable under the MLA, but rather, being a necessary by-product of its anticipated lithium mining operations, was exclusively owned by WLC under the General Mining Laws.

BLM prepared an MER, dated February 15, 2013, in order to generally assess the geology of the area of public lands at issue, and specifically the presence of potassium, lithium, hectorite, and other mineral resources, and to determine whether to recommend approval of CVM's PPA, based on an evaluation of the mineral potential and economic viability of mineral development and the potential for conflict

¹⁵ The original description stated that "the potassium mineralized zone is estimated to be approximately 200 to 450 feet thick, and the top of bedrock is believed to be 400 to 600 feet below ground surface." Original Kings Valley Potassium Mine Proposed Action at unp. 1-2. It added that "[t]he target potassium resource is believed to be near the surface." *Id.* at unp. 2.

between different forms of mineral exploration and development.¹⁶ BLM noted that the applicable land-use plan (July 1982 Paradise-Denio Management Framework Plan (MFP)) did not address the leasing of solid minerals, and therefore did not preclude CVM's PPA. However, it concluded that there was a clear potential for conflict between efforts to mine the same deposit in connection with CVM's PPA and WLC's mining POp, and, in any event, there was no reasonable expectation of finding a valuable deposit of potassium within the lands encompassed by CVM's PPA. See MER at 5.

In terms of a potential conflict, BLM stated that, while CVM's December 2010 revised exploration plan, and subsequent revisions, noted that CVM's target was the potassium-bearing tuffaceous sandstone interval immediately above bedrock, the September 2012 revised exploration plan, together with the conceptual mine plan, later identified the lithium and hectorite-bearing smectite clay interval above the tuffaceous sandstone interval as the target. See BLM Notes of Oct. 17, 2012, Meeting at 3; MER at 4, 7, 8, 9, 10, 14. The lithium and hectorite-bearing clay interval was, however, the target of WLC's approved exploration operations and proposed mining operations. See MER at 4 ("Information provided [by CVM] . . . make[s] clear CVM's intent to develop the same deposit identified by WLC for development under [its] mining claims; that is, the clay from the surface to 600 feet"), 10-11, 14 ("[I]t seems that CVM's proposed product is potassium silicate (KSiO₂) that purportedly occurs as part of the clay minerals claimed by WLC"); Memorandum to Deputy State Director from District Manager, dated Feb. 22, 2013, at unp. 2 ("During the October 17, 2012, meeting [between BLM and CVM], it became clear that CVM's intended target would be the clay identified by WLC in their lithium exploration and [hectorite] clay mine plans of operation, *rather than the tuffaceous sandstone originally presented*. This would create a conflict in development of the two mineral operations." (Emphasis added)). BLM concluded that CVM's efforts to mine potassium were likely to conflict with WLC's proposed hectorite mining operations. See MER at 5.

In terms of the potential presence of potassium, BLM stated, that, while clay deposits underlie the lands encompassed by CVM's permit application and potassium may be associated with clay deposits, potassium was considered an incidental

¹⁶ The MER, which was prepared by Janet L. Hook, BLM Geologist, HRFO, and approved by Ken Loda, Assistant Field Manager, Minerals, HRFO, was transmitted to the Nevada State Office, along with a Feb. 22, 2013, memorandum from the District Manager, Winnemucca District.

component.¹⁷ See MER at 4 (“All discussion of the potassium mineralization is in the context of describing the alteration zones of the volcanic rocks, *not as a potential source of potassium*” (Emphasis added)), 6-9, 12. BLM based its opinion on a literature review regarding lands in the McDermitt Caldera and on WLC’s exploration of the lands at issue. It concluded that potassium was not considered likely to be found underlying the lands at issue in qualities and quantities sufficient to be considered commercially valuable. See *id.* at 4, 5.

In his February 22, 2013, memorandum, transmitting the MER, the District Manager recommended that the State Office reject the permit application now at issue because (1) CVM’s true drilling program, which would require the drilling of *more than four drill holes*, in order to properly assess the existence of a leasable deposit of potassium underlying the 500 acres of public land covered by CVM’s conceptual mine plan, would directly interfere with WLC’s proposed hectorite clay mining, regardless of whether the same clay deposit was targeted; (2) “the 500 acres that *CVM would mine under a lease* would directly conflict with the proposed WLC [hectorite] clay mine [even were WLC to mine a different clay and, especially, since it] . . . would be mining the same clay”; and (3) “[a]vailable literature indicates that the geology of this area is *not likely to host* an occurrence of a valuable deposit of potassium.” Memorandum to Deputy State Director, dated Feb. 22, 2013, at unp. 3 (emphasis added).

In his April 2013 decision, the Deputy State Director denied CVM’s potassium PPA to the extent it encompassed 1,160 acres of public land, since CVM’s proposed “activities,” under the MLA, were “highly likely to materially interfere” with WLC’s proposed hectorite mining operations and approved lithium exploration operations, under the General Mining Laws, on such lands, and so approval of the permit application was, to that extent, “not in the public interest[.]”^{18,19} Decision at 6. He

¹⁷ WLC reported “findings of [its] exploration program” in NI 43-101 Technical Report, Preliminary Assessment and Economic Evaluation, Kings Valley Project, URS, dated Jan. 22, 2010, and Preliminary Feasibility Study, Kings Valley Lithium Project, Tetra Tech, dated Jan. 27, 2012. MER at 10.

¹⁸ The map (Permit Boundaries with Existing and Proposed Activities, Thacker Pass, NV) attached to BLM’s Decision discloses the relative location of the public lands encompassed by CVM’s PPA, WLC’s exploration PO, and WLC’s mining PO.

¹⁹ BLM denied CVM’s permit application to the extent it encompassed 1,160 acres of public land in sec. 8 and the W¹/₂, W¹/₂NE¹/₄, SW¹/₄SE¹/₄, and N¹/₂SE¹/₄ sec. 9 of the
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relied on the fact that, as determined in BLM's February 2013 MER, CVM's exploration plan, including its conceptual mine plan, targeted the same deposit as WLC's exploration and mine plans.

The Deputy State Director also addressed CVM's assertion that the hectorite clay in the deposit, which is targeted both by CVM's proposed exploration operations and WLC's proposed mining operations, is not a mineral locatable under the General Mining Laws, but rather a mineral leasable under the MLA. *See* Decision at 6. CVM had asserted that the mineral that is the focus of its exploration and potential development efforts is potassium silicate (KSiO₂).²¹ *See* BLM Notes of Dec. 28, 2010, Meeting at 2; MER at 13, 14. It further asserted that the potassium silicate renders the hectorite clay, which WLC seeks to mine, leasable, rather than locatable, since it is present in the clay in sufficient quantities to be considered commercially valuable and/or is essential to the existence of the clay as a valuable mineral. *See United States v. Bardsley*, 45 IBLA 367, 372 (1980) ("Borrowing from our decision in *United States v. Union Carbide Corporation*, 31 IBLA 72 (1977), we hold that the natural brine . . . may be considered a valuable deposit of a sodium compound . . . if either of two contingencies occur. First, sodium must be present in sufficient quantity as to be commercially valuable. Second, sodium must be essential to the molecular structure of the valuable mineral. Absent both of these contingencies, the natural brine is not subject to the sodium provisions of the Mineral Leasing Act." (Emphasis added));

(...continued)

subject township. It otherwise left the permit application pending with respect to the remaining 760 acres of public land in the E½NE¼ and SE¼SE¼ sec. 9 and sec. 16 of the subject township. BLM stated that it would suspend consideration of that portion of the application "until CVM submits an exploration plan," pursuant to 43 C.F.R. §§ 3505.40 and 3505.45. Decision at 7. BLM reports that the permit application remains pending as to that land. *See* Answer at 2.

²¹ At one time, CVM also had asserted that the mineral that is the focus of its exploration and potential development efforts might be potassium sulfate (K₂SO₄). *See* BLM Notes of Dec. 28, 2010, Meeting at 2; MER at 13. Indeed, as part of its conceptual mine plan, it had originally proposed to either mine and non-chemically process the extracted material for the recovery of potassium silicate, or mine and chemically process the extracted material for the recovery of potassium sulfate. *See* Original Kings Valley Potassium Mine Proposed Action at unp. 7. However, CVM later deleted the proposal to mine and chemically process the material for the recovery of potassium sulfate from its conceptual mine plan, evidently since the costs of doing so are likely to be prohibitive. *See* Updated Kings Valley Potassium Mine Proposed Action at unp. 10.

Letter to BLM from CVM, dated Nov. 2, 2012, at 1-2; E-Mail to BLM from CVM, dated Dec. 11, 2012.

The Deputy State Director, however, noted that BLM had concluded, in its February 2013 MER, that potassium silicate was not found in sufficient quantities to be commercially valuable and was not essential to the existence of the clay as a valuable mineral. He concluded that CVM had failed to establish that the hectorite clay in the targeted deposit is a mineral not locatable under the General Mining Laws, but rather leasable under the MLA. In effect, it seems clear that he also concluded that the potassium silicate in the hectorite clay is not separately leasable under the MLA. See Decision at 6 (“BLM does not consider that the [hectorite] clay associated with this deposit is a silicate of potassium as used in the mineral leasing law”); e.g., *Footo Mineral Co. v. United States*, 654 F.2d 81, 85-87 (Ct. Cl. 1981). However, we do not think that the Deputy State Director’s seeming determination that, either because it is an inextricable part of the clay or for another reason, the potassium silicate in the clay is *not leasable* is definitively expressed, let alone fully justified by his decision. It is clear, however, that he did not conclude that the potassium silicate *beneath the clay stratum* is not leasable under the MLA.

CVM appealed timely from the Deputy State Director’s April 2013 decision, contending, *inter alia*, that (1) its proposed exploration operations, described as “a mere 4 holes in the ground,” which were “picked . . . with BLM’s . . . concurrence so as NOT to interfere with WLC’s activities,” “could not possibly or reasonably interfere with [WLC’s proposed] mining operations” or WLC’s approved exploration operations; and (2) BLM acts contrary to the public interest by refusing to afford it the ability to explore for and potentially exploit the potassium that is “substantial[ly] probab[le]” to exist under the applied-for lands, which will, as a consequence of royalty payments and other means, redound to the benefit of the United States and the State of Nevada.²² Statement of Reasons (SOR) at 2, 6.

Discussion

Under section 1 of the Act of February 7, 1927, 30 U.S.C. § 281 (2012), and 43 C.F.R. § 3505.50(a), BLM has complete discretion to grant an application for

²² CVM also indicates that, unless BLM issues the proposed permit and allows CVM to potentially obtain a PRL, BLM will have undermined its claim to the potassium silicate under the MLA, by allowing WLC to produce the mineral as a by-product of its mining operations, under the General Mining Laws. See SOR at 7. We find CVM’s concern premature, since WLC’s mining operations have yet to be approved.

potassium prospecting permit to a qualified applicant when prospecting is needed to determine the existence of a valuable potassium deposit on lands available for leasing. See 43 C.F.R. §§ 3501.10(a), 3502.10, and 3505.10(a); e.g., *Western Industrial Minerals*, 182 IBLA 11, 19, 23 (2012) (hardrock mineral PPA); *Harry E. McCarthy*, 128 IBLA 36, 40 (1993) (sodium PPA); *Elizabeth B. Archer*, 102 IBLA 308, 315 (1988) (phosphate PPA) (“[T]he law is clear that the mere filing of a prospecting permit application gives an applicant no right to the permit. The filing of the permit application merely affords the applicant a priority right to a permit *should a permit subsequently be issued.*”); *Clear Creek Inn Corp.*, 7 IBLA 200, 221-22, 79 I.D. 571, 581-82 (1972) (coal PPA); *Utah Magnesium Corp.*, 59 I.D. 289, 290 (1946) (potassium PPA). Such a permit affords the applicant “the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of potassium” in an area of public lands not in excess of 2,560 acres, in reasonably compact form, for a period not to exceed 2 years.²³ 30 U.S.C. § 281 (2012). However, while a permit affords the permittee the right to determine whether a valuable deposit exists, he “may remove *only material needed to demonstrate the existence of a valuable mineral deposit,*” and therefore may only undertake drilling and/or other sampling efforts calculated to achieve that aim. 43 C.F.R. § 3505.10(b) (emphasis added).

Following issuance of a prospecting permit, a permittee is entitled to a preference right lease to the permitted lands upon a showing, pursuant to section 2 of the Act of February 7, 1927, 30 U.S.C. § 282 (2012), that a “valuable deposit[]” of potassium has been discovered on such lands and such lands are “chiefly valuable” for potassium. See 43 C.F.R. § 3507.11; e.g., *Yankee Gulch Joint Venture v. BLM*, 113 IBLA 106 (1990) (sodium PRL).

Under section 4 of the Multiple Mineral Development Act, 30 U.S.C. § 524 (2012), a mining claim located under the General Mining Laws after August 13, 1954, which is the date of enactment of the Act, is subject, prior to patent, to a reservation of all leasable minerals to the United States. See Sol. Op., “Mining Claims–Rights to Leasable Minerals,” M-36764.4357, 75 I.D. 397, 399 (1968); *Arthur L. Rankin*, 73 I.D. 305, 310, 311 (1966).²⁴ Further, the reservation affords

²³ Upon a showing of “satisfactory cause,” the permit may be extended for a period not exceeding 2 years. 30 U.S.C. § 287 (2012).

²⁴ In his Dec. 4, 1968, opinion, the Solicitor further held that a mining claim located after Aug. 13, 1954, affords the claimant no rights not only to any leasable minerals, but also to any “locatable minerals which cannot be mined without extracting or disturbing the leasable minerals.” Sol. Op., “Mining Claims–Rights to Leasable Minerals,” M-36764.4357, 75 I.D. at 403. He explained:

(continued...)

the United States, its lessees, *permittees*, and licensees [*the right*] to enter upon the land covered by such mining claim . . . and to prospect for, drill for, mine, treat, store, transport, and remove [*the leasable*] . . . minerals and to use so much of the surface and subsurface of such mining claim . . . as may be necessary for such purposes[.]” *Id.* (emphasis added). Accordingly, since a mining claim located after August 13, 1954, affords the claimant no rights to any leasable minerals, the claim, prior to patent, poses no impediment to the issuance of a prospecting permit for potassium.²⁵

However, the right afforded to permittees under 30 U.S.C. § 524 (2012) is “limited” by section 6 of the Multiple Mineral Development Act, 30 U.S.C. § 526 (2012). Therefore, in the case of a co-existing mining claim and prospecting permit, the statute provides that the claimant is required to conduct mining operations, “so far as reasonably practicable, in a manner which will avoid damage to any known deposit of any [leasable] . . . mineral,” and the permittee is required to conduct exploration operations, “so far as reasonably practicable, in a manner which will avoid damage to any known deposit of any [locatable] mineral[.]” 30 U.S.C. § 526(b) and (c) (2012). Further, the claimant and the permittee are each required to conduct their operations in such a manner “as not to endanger or materially interfere” with any existing surface or underground workings undertaken in conjunction with the other’s operations or with the utilization of such workings,

(...continued)

Throughout the consideration of S. 3344, which was to become the Multiple Mineral Development Act, and a companion measure, H.R. 8896, the focus of the legislative debates related solely to physically separate deposits of locatable and leasable minerals It is apparent from the absolute reservation of leasable minerals prescribed by section 4 that the Act could not have been intended to authorize the location of minerals contained in commingled deposits from which the locatable minerals could be removed only by removal of or significant damage to the leasable minerals. To read the Act as so intending would be to nullify the absolute and specific reservation of leasable minerals mandated by the Congress in section 4. *Id.* at 399-400. This ruling would only apply here, with respect to any potassium silicate commingled with the hectorite clay, were the potassium silicate properly considered a leasable mineral.

²⁵ Even were BLM to patent the mining claim, the statute provides that the patent shall reserve to the United States “such lands . . . which at the time of the issuance of such patent” were covered by a permit or lease or a permit or lease application or offer, or were known to be valuable for leasable minerals. 30 U.S.C. § 524 (2012).

unless a court of competent jurisdiction basically determines, pursuant to 30 U.S.C. § 526(d) (2012), that the value of permitting use by the claimant or permittee outweighs the resulting injury or damage to the other party, subject to payment for such injury or damage. 30 U.S.C. § 526(b) and (c) (2012).

Section 4 of the Act of February 7, 1927, 30 U.S.C. § 284 (2012), also authorizes BLM to issue prospecting permits “for deposits of potassium in public lands, also containing deposits of coal *or other minerals*, on condition that such other deposits be reserved to the United States for disposal under appropriate laws[.]” (Emphasis added.) Further, the section specifically provides that, in instances where “valuable deposits of mineral now subject to disposition under the general mining laws” are found in fissure veins on the permitted lands, such minerals “shall continue subject to disposition under the said general mining laws notwithstanding the presence of potash therein.” *Id.* Thus, despite issuance of a prospecting permit, BLM may allow the location and patenting of mining claims for “other minerals,” under the General Mining Laws. *Id.*

Finally, once a mining claim is located on public lands, and prior to patent, section 4(b) of the Multiple Use Mining Act of 1955 (also known as the Surface Resources Act), 30 U.S.C. § 612(b) (2012), provides that “any use of the surface” of such claim by a BLM permittee “shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.”

[1] It is well established that BLM may deny an application where exploration operations authorized by the proposed prospecting permit are determined to be likely to interfere with other legitimate uses of the affected public lands, or otherwise be contrary to the public interest. *See Western Industrial Minerals*, 182 IBLA at 23; *Harry E. McCarthy*, 128 IBLA at 40; *Elizabeth B. Archer*, 102 IBLA at 316 (“[BLM rejection of a phosphate PPA] could be based on environmental concerns, or fear that phosphate mining might interfere with other mineral or nonmineral uses of the land, or similar considerations”); *Agricultural Research Service*, A-31033 (Jan. 17, 1969) (Department properly approved phosphate PPA in part, subject to stipulations restricting access and mineral exploration activity, after considering compatibility of mineral exploration with use of lands within designated experimental sheep grazing area); *D.O. McGoon, Jr.*, A-28892 (July 12, 1962) (Department properly denied coal PPA because mineral exploration incompatible with public recreational use within National Forest); *Jeanette A. Bennett*, A-27122 (June 28, 1955) (Department properly denied sodium PPA because mineral exploration incompatible with protection and management of wildlife within designated antelope range); *H.C. Thomas*, A-24610 (June 3, 1947) (Department properly denied sodium PPA because mineral exploration incompatible with use of lands by Navy as designated aerial gunnery

range); *D.E. Jenkins*, 55 I.D. 13, 14 (1934) (Department properly denied coal PPA because available market already satisfied by existing mines). However, as the Board stated in *Elizabeth B. Archer*, 102 IBLA at 316, “even such a discretionary action must be supported by facts of record.”

BLM’s decision to deny the PPA on the basis that CVM’s proposed exploration operations are highly likely to materially interfere with WLC’s approved exploration and proposed mining operations is based on the professional opinion of its technical experts, based on their analysis of all available data. It is well established that BLM is entitled to rely on the professional opinion of its experts, where it concerns matters within the realm of their expertise and is reasonable and supported by record evidence. *See, e.g., IMC Chemical Inc.*, 155 IBLA 173, 197 (2001); *West Cow Creek Permittees v. BLM*, 142 IBLA 224, 238 (1998). A party challenging such reliance must demonstrate, by a preponderance of the evidence, error in the data, methodology, analysis, or conclusion of the expert. It must show, with objective evidence, *either* that BLM “erred when collecting the underlying data, when interpreting that data, or when reaching the conclusion,” *or* that “a demonstrably more accurate study has disclosed a contrary result.” *West Cow Creek Permittees v. BLM*, 142 IBLA at 238. Conclusory allegations of error or a mere difference of professional opinion will not suffice to show that BLM erred. *Id.* Above all, the party “must show not just that the results of . . . [BLM’s analysis and conclusion] *could be* in error, but that they *are* erroneous.” *Id.*

Generally, a BLM decision, made in the exercise of its discretionary authority, will be overturned by the Board only when it is arbitrary and capricious, and, as such, not supported on any rational basis. *See, e.g., Echo Bay Resort*, 151 IBLA 277, 281 (1999), and cases cited. The burden is upon an appellant to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made. *See Western Industrial Minerals*, 182 IBLA at 21; *Wiley F. Beaux*, 171 IBLA 58, 66 (2007); *Echo Bay Resort*, 151 IBLA at 281. This burden is not satisfied simply by expressions of disagreement with BLM’s analysis or conclusion. *See Western Industrial Minerals*, 182 IBLA at 21; *Echo Bay Resort*, 151 IBLA at 281.

It is undisputed that, at least to the extent of the 1,160 acres now at issue, CVM’s proposed exploration operations for potassium silicate and WLC’s approved exploration operations for lithium and proposed mining operations for hectorite encompass most of the same public lands. *See* Decision at 6; WLC Brief at 14. Indeed, the map attached to BLM’s Decision discloses that most of the lands within the 1,160-acre PPA tract are covered by WLC’s exploration POp (“WLC_Lithium_

Expl_PoO Bdry”) and WLC’s mining POp (“WLC_Clay_POO_Boundary”). See BLM Map, WLC POp NVN-085255 and CVM PPA NVN-087015, dated Nov. 14, 2011.

The Deputy State Director’s conclusion that CVM’s proposed exploration operations are highly likely to materially interfere with the WLC’s approved exploration operations and proposed mining operations hinges on his determination that all such operations “coincide” on the public lands.²⁶ Decision at 6. While not clear, the Deputy State Director seems to have concluded that CVM’s and WLC’s operations coincide since they are to be situated on the same public lands and/or target the same deposit underlying those lands.

We note, at the outset, that BLM states that the true target of CVM’s efforts, underlying the public lands encompassed by CVM’s PPA and WLC’s unpatented mining claims, is not the tuffaceous sandstone interval found at bedrock, but rather the clay stratum that lies above the tuffaceous sandstone interval. It identifies two clay intervals in the clay stratum. The clay interval said to contain hectorite, which is the target of WLC’s proposed mining operations, overlies the clay interval said to contain lithium, which is the target of WLC’s approved exploration operations. See Decision at 6 (“The [hectorite] clay to be mined [by WLC] is the oxidized overburden to the lower clay that contains the proposed lithium”); Letter to BLM from WLC, dated Jan. 28, 2013 (attached to WLC Brief), at 2 (“Proposed clay mining will be limited to the upper oxidized zone at depth of approximately 60 feet or less where the better clays for drilling mud and organo-clay have been identified”). However, it appears that the entire clay stratum, in fact, consists of hectorite clay that contains lithium in varying amounts.

We need not resolve the question of whether the tuffaceous sandstone interval or one or both of the clay intervals constitutes the true target of CVM’s efforts. CVM clearly intends to drill down through the entire clay stratum, for the purpose of

²⁶ BLM states on appeal that, although WLC stated in 2012 that it would not be submitting a mining POp for lithium, WLC indicated that it might do so in the future and, in fact, it is “reasonable to assume” that WLC will submit a POp, based on the results of its lithium exploration operations. Answer at 6. BLM’s decision was based solely on the alleged material interference by CVM’s potassium exploration operations with WLC’s approved lithium exploration operations and proposed hectorite mining operations. Therefore, we do not address whether BLM properly denied CVM’s permit application based on material interference with possible lithium mining operations by WLC.

assessing the presence of potassium *extending all the way down to bedrock*.²⁷ Therefore, CVM's drill holes will pass through the two clay intervals, both of which will likely be assessed for the presence of potassium.²⁸ See Decision at 5 (“[CVM’s] September 28, 2012, plan identifies the target horizon as *the clays above the sandstone*” (Emphasis added)). Whether such drilling will materially interfere with WLC’s approved lithium exploration operations or WLC’s proposed hectorite mining operations is what is now at issue.

To find a potential conflict between CVM’s and WLC’s operations unacceptable, it is sufficient that there is a high likelihood that CVM’s operations will materially interfere with WLC’s operations. Hence, we think that the risk of material interference is sufficient for BLM to decline to approve CVM’s operations. See *Harry E. McCarthy*, 128 IBLA at 40.

The Deputy State Director denied CVM’s permit application on the basis of BLM’s conclusion that CVM’s proposed potassium exploration operations are highly likely to materially interfere with WLC’s approved lithium exploration operations and proposed hectorite mining operations. See Decision at 6. We now consider whether BLM’s determination that CVM’s operations are, in fact, highly likely to materially interfere with WLC’s operations is rational and supported by the record.

CVM argues that the drilling of the proposed four drill holes will not interfere with WLC’s approved lithium exploration operations, since “WLC already has completed its exploration activities under its exploration plan.” SOR at 6. It also contends that the drilling of its four proposed drill holes will not interfere with WLC’s proposed hectorite mining operations, which will create mining pits encompassing

²⁷ We note that both of the clay intervals have been determined by WLC, through drilling, to contain potassium. See WLC Brief at 11. It states that the noted potassium values “approximate or are less than the crustal average of potassium”: “The average content of potassium in the deeper lithium ores is 3.89%[.] . . . The average content of potassium in the hectorite clay in the Clay Mine proposed WLC -- 01 Pit is 1.97%[.] . . . The average content of potassium in the hectorite clay in the Clay Mine proposed Central Pit is 2.61%[.]” WLC Brief at 11.

²⁸ CVM indicates, on appeal, that the lithium-bearing clay interval is the target of its potassium exploration operations. See SOR at 4 (“Th[e] area [deemed by WLC to contain high grade lithium] is considered by CVM to [be] a potentially valuable potassium deposit”). However, we do not think that CVM has ruled out the hectorite-bearing clay interval as a target of its potassium exploration operations.

“an approximate total area of only 23 acres,” which will extract a total of 375,000 tons of hectorite clay during the 20-year life of the mine: “WLC’s [mining] operations, as disclosed in its Plan of Operations, is so minimal that one man operating a Cat 330D excavator could produce the entirety of the WLC mine’s projected production in a mere 18 months of the 20-year life of the mine.” *Id.* at 4, 6.

Although the Deputy State Director denied CVM’s permit application, having concluded that CVM’s proposed potassium exploration operations are highly likely to materially interfere with WLC’s approved lithium exploration operations and proposed hectorite mining operations, on appeal, BLM argues that it is concerned not with the likelihood of material interference posed by drilling the four drill holes that would be authorized by issuance of a prospecting permit, but by the likelihood of material interference posed by *potential potassium mining operations*, since issuance of a prospecting permit “irrevocably commits” BLM “to issue a preference right lease if the permittee discovers a valuable deposit of [potassium] . . . and the land is determined to be chiefly valuable therefor.” Answer at 5 (quoting *Harry E. McCarthy*, 128 IBLA at 42). BLM states that CVM “makes no attempt to show how it may be able to *mine* the potassium targeted by its exploration plan without materially interfering with WLC’s existing or future exploration or mining activities.”²⁹ *Id.*

To begin, we think it undisputable that BLM did not expressly rest its decision on the alleged material interference created by CVM’s proposed potassium mining operations. Furthermore, although BLM is correct that issuance of a prospecting permit irrevocably commits BLM to leasing and, therefore, to mining somewhere and at some time within the leased lands, such commitment only arises should CVM discover a valuable potassium deposit and the land be found chiefly valuable for potassium. We are not persuaded that such operations are reasonably likely.

Nowhere has there been any showing that this is likely to occur. BLM’s February 2013 MER concluded that there is unlikely to be any potassium, and

²⁹ WLC also indicates, on appeal, that BLM’s decision to deny CVM’s permit application is supported by the material interference likely to be caused by the additional exploration operations that CVM will inevitably seek to pursue, and, ultimately, its mining operations. See Brief at 6 (“[CVM’s] assertion [of no material interference] . . . ignores completely the significant potential . . . risks of having independent third parties conducting mineral exploration *and mining* in the midst of WLC’s mine development and mining” (Emphasis added)), 7 (“[CVM’s mine planning and development] will require exploration far beyond a mere four drill holes”). All that is at issue is a permit application seeking to drill four drill holes.

certainly none sufficient to be considered a valuable deposit. It remains to be determined whether BLM is correct. However, there is no evidence that a valuable deposit yet exists. Nonetheless, despite the considerable evidence arrayed against it, CVM is entitled to determine for itself whether a valuable deposit exists underlying the lands at issue.

The likelihood that potassium mining will occur should not weigh against issuance of a prospecting permit for additional reasons. Should BLM be committed to leasing and mining operations in the future, it must consider section 4(b) of the Surface Resources Act and ensure that CVM's mining operations do not "endanger or materially interfere with prospecting, mining or processing operations" by WLC on its mining claims and, by section 6(c) of the Multiple Mineral Development Act, to ensure that such mining "avoid[s] damage" to any deposit of locatable minerals and does not "endanger or materially interfere" with WLC's surface and underground workings and its utilization of such workings. 30 U.S.C. §§ 526(c) and 612(b) (2012).

Indeed, even now BLM can take measures to ensure there will be no material interference with WLC's prospecting, mining or processing operations. BLM may impose appropriate stipulations on the issuance of the PPA. Those restrictions may provide that, in the event the lands at issue are found to contain a valuable deposit of potassium and be chiefly valuable for potassium, BLM retains the authority to determine whether or under what terms and conditions a PRL will issue, based upon consideration of whether mining operations under the lease are likely to damage the deposit of locatable minerals and endanger or materially interfere with operations under WLC's mining claims. *See Uintah Mountain Club*, 116 IBLA at 271-72; *Stanford R. Mahoney*, 12 IBLA 382, 388 (1973).

We will not prejudge whether CVM will discover a valuable potassium deposit and whether the land will be found chiefly valuable for potassium, and if so, whether there then will be a likelihood of material interference posed by this *potential potassium mining operation*. Rather, we focus on the alleged material interference created by CVM's *proposed potassium exploration operations*. *See Western Industrial Minerals*, 182 IBLA at 12 n.1 ("BLM's rejection was also based upon its concern that resource degradation would result *from future mining*[.] . . . Because WIM's [prospecting] permit application seeks only to explore for minerals, we do not presently consider BLM's hypothetical concern [regarding] . . . mining[.]" (Emphasis added)); *Harry E. McCarthy*, 128 IBLA at 42 ("[Appellant] correctly states that the

applicable regulations do not require a detailed review of the speculative impacts of *mining* before issuance of a prospecting permit” (Emphasis added)).³⁰

We are not persuaded that BLM has demonstrated that drilling four drill holes is highly likely to materially interfere with WLC’s approved lithium exploration operations or proposed hectorite mining operations. We generally agree that, were CVM’s exploration operations to take place on the same public lands as WLC’s approved exploration operations or proposed mining operations, and/or to target the same underlying deposit at the same time, the likelihood that such operations would conflict is fairly high. We are not persuaded that such is the situation here.

CVM asserts that WLC’s lithium exploration operations have concluded, and therefore that CVM’s potassium exploration operations are no longer highly likely to materially interfere with WLC’s lithium exploration operations. BLM responds that CVM “provides no evidence to support its assertion, and BLM has no information indicating that this is true.” Answer at 7. It notes that WLC had, as of September 2012, proposed to disturb the surface of “only up to 55.14 acres” in connection with lithium exploration, leaving 19.86 acres of the total 75 acres for which it had yet to propose surface disturbing operations. *Id.*

The map attached to BLM’s Decision discloses that all four drill holes are to be drilled on public lands encompassed by WLC’s approved lithium exploration operations. See BLM Map, CVM Conceptual Mine Plan, WLC POP NVN-085255, and WLC POP NVN-091547, dated Dec. 17, 2012. However, the four drill holes are to be drilled, in some cases, near, but on different lands than, WLC’s drill holes, and, in other cases, far from WLC’s drill holes. See MER at 25 (Figure 7). It also appears that all of WLC’s lithium drill holes have been drilled. See *id.* at 10.

³⁰ In *McCarthy*, however, we affirmed BLM’s rejection of a sodium PPA based on consideration of “the effects of leasing,” since issuance of a PPA irrevocably committed BLM to leasing, in the event of satisfaction of 30 U.S.C. § 282 (2012), and the lands at issue were *withdrawn from leasing* and therefore, in our estimation, also from issuance of a PPA, absent a showing, then yet to be made, that the development of sodium would not adversely affect the oil shale values of such lands. 128 IBLA at 42; see *id.* at 40-42. Accordingly, we affirmed BLM’s decision to “defer” issuance of a PPA until it could be demonstrated that the lands were excepted from the withdrawal, because, under its terms, sodium development would not adversely affect the oil shale values of such lands. *Id.* at 42. In the present case, the lands at issue are not withdrawn from leasing and from issuance of a PPA.

Regardless of whether WLC's holes have already been drilled, we find no evidence in the record to indicate that any of CVM's four drill sites are situated in close proximity to WLC's exploration drill holes, or that any of CVM's four drill holes will interfere in any discernible way with any remaining lithium exploration under the POp and Notice. Nothing to that effect is set forth in BLM's Decision, or even the MER or the District Manager's February 2013 transmittal memorandum.³²

Nor did BLM explain, in its Decision or the MER or the District Manager's February 2013 transmittal memorandum, how drilling four drill holes is highly likely to materially interfere with WLC's proposed hectorite mining operations. Moreover, in a December 28, 2012, statement, the Field Manager, HRFO, specifically stated, at unp. 2, that "[t]he four drill holes as currently proposed *do not directly conflict with the [hectorite] clay plan of operations* submitted by Western Lithium[.]" (Emphasis added.) Rather, like the District Manager in his February 2013 transmittal memorandum, the Field Manager was concerned that the drilling of additional drill holes, in order to properly assess the occurrence of potassium in the 500-acre area covered by the conceptual mine plan, and mining under the conceptual mine plan, would directly conflict with WLC's proposed hectorite mining operations. However, such activities are not now at issue.

On appeal, however, BLM indicates that there is highly likely to be material interference since the four drill holes "surround the facilities proposed by WLC for its [hectorite] clay mine" and CVM "would use access roads that WLC constructed and would continue to maintain and use under its [hectorite] clay [POp]."³³ Answer at 6.

³² We note further that, in a Sept. 21, 2012, letter to BLM, WLC stated that since BLM was determined to process the PPA now at issue, WLC would not object if the permit was "issued on the express condition that CVM will not be allowed or authorized to delay, interfere or hinder any of WLC's exploration and development activities [for lithium] on its unpatented mining claims[.]" Letter to BLM, dated Sept. 21, 2012, at 2. It retained the right, however, to object to issuance of a PRL. See *id.* at 3. WLC thereby indicated that CVM might be able to drill the four drill holes without materially interfering with its approved lithium exploration.

³³ Furthermore, the map attached to BLM's Decision discloses that, while most of the area of public lands encompassed by CVM's conceptual potassium mine ("CVM CONCEPTUAL MINE BDRY") covers lands encompassed by WLC's proposed hectorite mine ("WLC_Clay_POO_Boundary"), including almost all of WLC's proposed mine facilities ("WLC_ProposedClayFacilities"), the four "CVM Drill Sites" are situated, in the case of all four sites, a short distance to the east or west of WLC's
(continued...)

BLM also disputes CVM's assertion that WLC's proposed mining operations are limited, being restricted to 23 acres and lasting no more than 18 months, arguing that this is not supported by any evidence. *See id.* at 7. WLC reports that, in fact, the 375,000 tons to be extracted consist of clay ore, noting that, since the ore is overlain to varying degrees by overburden, it expects to mine a total of 374,810 tons of clay ore and 1,189,650 tons of overburden, over the 20-year life of the mine. *See* Brief at 20-21. It states that it expects to mine "approximately 140,000 tons [of overburden and clay ore] per year." *Id.* at 21. WLC also indicates that its operations are subject to change in accordance with market conditions, operational demands, and other circumstances. *See id.* at 6.

The map attached to BLM's Decision discloses that CVM would use its own access roads ("CVM PROPOSED ROADS"), rather than WLC's access roads ("WLC Existing Drill Roads"). *See* MER at 25 (Figure 7); Figure 1 (Kings Valley Lithium Project) (attached to Letter to BLM from WLC, dated Sept. 21, 2012). The road accessing the four drill sites from a paved highway (State Route 293), to the south, is elsewhere identified as an existing access road. *See* Updated Kings Valley Potassium Mine Proposed Action at unp. 16 (Figure 1-3 (Locations of Proposed Exploration Borings and Mine Facilities)); Revised Exploration Plan, dated December 2010, at 3 (Figure 1-2 (Project Area Showing CVM Permit Areas)), 11; Revised Exploration Plan, dated April 2012, at 3 (Figure 1-2 (Project Area Showing CVM Permit Area)), 7 (Figure 3-1 (Locations of Proposed Exploration Borings)), 11; MER at 3, 6. The remainder of the proposed access roads would be constructed by CVM.³⁴ *See* Updated Kings Valley Potassium Mine Proposed Action at unp. 16 (Figure 1-3); Revised Exploration Plan, dated December 2010, at 6, 11; Revised Exploration Plan, dated April 2012, at 7 (Figure 3-1), 11.

(...continued)

proposed mine facilities, and, in the case of two sites, outside the area encompassed by WLC's proposed hectorite mine. *See* MER at 25 (Figure 7).

³⁴ We note that CVM appears to have considered using WLC's roads. *See* BLM Notes of Oct. 17, 2012, Meeting at 2, 7 ("CVM . . . will refine the description of the proposed conceptual mine plan in terms of . . . [r]oads to coincide with previously constructed roads to access proposed drill hole locations"); ARCADIS U.S., Inc. Notes of Oct. 17, 2012, Meeting at 1 ("BLM[:]. . . Would CVM use roads that Western Lithium has already developed? CVM[:]. [Y]es, use existing roads where possible."). It also appears that CVM sought to do so, provided it was approved by WLC and BLM. We find no formal proposal by CVM to use WLC's roads.

The map attached to BLM's Decision also discloses that only two of the four drill holes are to be drilled on public lands encompassed by WLC's proposed hectorite mining operations. See BLM Map, CVM Conceptual Mine Plan, WLC POp NVN-085255, and WLC POp NVN-091547, dated Dec. 17, 2012; MER at 25 (Figure 7); (MASS) Serial Register Page, NVN-091547, dated Mar. 4, 2014. Further, WLC's proposed hectorite mining and related operations are actually expected to affect more than 23 acres, but only up to 98.96 acres, of public land. These lands appear to be depicted on the map attached to BLM's Decision as "WLC_ProposedClayFacilities." See WLC Map, Kings Valley Clay Project POp, dated Oct. 1, 2012. We find nothing to indicate that any of the four drill holes, which, admittedly, will "surround" the mine area, cannot be drilled in such a manner that they do not interfere with actual mining and related operations. Answer at 6.

In the final analysis, we conclude that BLM's assertions of material interference are little more than conclusory. Although the burden to demonstrate error in the decision rests with the permit applicant, it is BLM's responsibility, in the first instance, to ensure that its decision contains a reasoned and factual explanation, well-supported by the administrative record, girding its conclusion of a high probability of material interference with WLC's proposed and approved exploration and mining operations, under its unpatented mining claims. See, e.g., *Western Industrial Minerals*, 182 IBLA at 19-21. BLM has not fulfilled that obligation here. Therefore, we set aside BLM's decision and remand the case to BLM for reconsideration of the matter. See, e.g., *Elizabeth B. Archer*, 82 IBLA 14, 24 (1984).

In deciding whether to approve CVM's PPA, BLM was required to take into account the longstanding principle that it should consider *less stringent alternatives to rejection of the application*. See, e.g., *Western Industrial Minerals*, 182 IBLA at 21, 24 ("BLM fails to explain in its decision . . . whether protective stipulations would adequately protect the [other] resource values"), 24-25; *Echo Bay Resort*, 151 IBLA at 281. We will not lightly set aside a decision based on the professional opinion of BLM's experts, concerning matters within the realm of their expertise, even though it represents a subjective judgment based on established facts. See, e.g., *John Dittli*, 139 IBLA 68, 75 (1997). However, the record should reflect a thorough effort by BLM to consider whether appropriate measures to avoid or mitigate undesirable environmental or other impacts could have been adopted, allowing the application to be approved in some way and to some extent, and hence its benefits to be achieved in some measure, rather than rejecting outright the entire application.

Since we are not persuaded that the administrative record reflects such an effort by BLM, we find ample reason to set aside BLM's decision to reject the PPA, and remand the case for consideration of less stringent alternatives. At a minimum, BLM should consider whether it may, in approving the PPA, render any future

issuance of a PRL to CVM, upon satisfaction of 30 U.S.C. § 282 (2012), contingent on determining whether potassium mining, somewhere and at some time on leased lands, is likely to endanger or materially interfere with operations by WLC under the General Mining Law, or, at least, may be made subject to appropriate stipulations to avoid or mitigate adverse impacts to such operations. *See Uintah Mountain Club*, 116 IBLA at 272 (“All of appellants’ concerns regarding various anticipated impacts of lease development will clearly be addressed if it turns out that a valuable deposit exists, that a lease will issue, and that development will occur. At the present stage, the goal of the approved action, exploration, is limited to establishing whether a deposit exists.”); *Agricultural Research Service*, A-31033 (Jan. 17, 1969), at 4, 5, 8 (“[The Department properly found] that, with appropriate safeguards, the exploration necessary to determine the mineral potential of the land could be conducted, while, at the same time, the [agency administering the surface of the lands] would be protected from undue interference with its assigned use of the land. . . . [S]ome intrusion will be permitted where it appears that the mineral exploration . . . is in the public interest *and that it can be accomplished in such a manner as to insure that there will be no material interference with the operations of the administering agency.*” (Emphasis added)); *William P. Finley*, 49 L.D. 616 (1923) (Department properly considered issuing coal PPA subject to conditions protecting potential power development of lands within powersite withdrawal). Should no such alternatives present themselves, BLM may, at that time, be justified in once again rejecting the application. Such rejection, which should be fully explained in the decision and supported by the record, may then again be appealed to the Board.

CVM also properly asserts that BLM’s denial of its proposed exploration operations is, on its face, contrary to the letter and spirit of the Multiple Mineral Development Act, 30 U.S.C. §§ 521-531 (2012), which was enacted by Congress “to ensure that mineral development under the Mining Law and the Mineral Leasing Act could co-exist.”³⁵ SOR at 6. It states: “If . . . the area is [by virtue of the presence of

³⁵ See Sol. Op., “The Effect of Mining Claims on Secretarial Authority to Issue Prospecting Permits for Coal and Phosphate,” M-36893, 84 I.D. 442, 446-48 (1977); *Foote Mineral Co.*, 34 IBLA 285, 313, 85 I.D. 171, 185 (1978) (Stuebing, A.J., dissenting), *rev’d on other grounds*, *Foote Mineral Co. v. United States*, 654 F.2d 81 (Ct. Cl. 1981) (“[T]he existence of mineral leases for sodium and potassium [which co-exist with lithium, a locatable mineral, in the same brine] does not preclude the production of locatable minerals from the same land. It once would have, but Congress cured this impediment in 1954 by enacting the Multiple Mineral Development Act[.] . . . That legislation made it possible to simultaneously produce locatable and leasable minerals from the same land, each being governed by its respective statute.”); Phillip Wm. Lear, *Multiple Mineral Development Conflicts: An* (continued...)

potassium] subject to the Mineral Leasing Act, then BLM can proceed to fulfill its responsibilities under the Multiple Mineral Development Act to ensure both the locatable mineral . . . *and* the leasable mineral can be developed. It cannot avoid those responsibilities by simply denying the prospecting permit in the first instance.” Reply at 2. Indeed, BLM has stated, referring to WLC’s originally anticipated lithium mining operations, but equally to WLC’s now proposed hectorite mining operations, and its ongoing lithium exploration operations, in light of CVM’s proposed exploration operations: “The WLC mining claims and exploration permits clearly predate the CVM potassium prospecting permit applications. Nevertheless, BLM is mandated to consider multiple mineral development. Therefore, *BLM will consider the feasibility of developing both operations[.]*” Status Report, dated Oct. 18, 2011, at 2 (emphasis added).

In addition to concluding that CVM’s operations are highly likely to materially interfere with WLC’s operations, the Deputy State Director stated, in his April 2013 Decision, that potassium silicate, the mineral targeted by CVM’s proposed exploration operations, is not reasonably expected to be found in the public lands at issue in qualities and quantities sufficient to constitute a commercially valuable deposit. See Decision at 4 (“[BLM determined in the February 2013 MER] [t]here is not a reasonable expectation for occurrence of a valuable deposit of potassium”), 5 (“The authors [of the MER] did not consider potassium minerals in this area as a potential ore”), 6 (“[P]otassium minerals are not likely to be recoverable as a primary product and in sufficient quantities so as to be commercially valuable. . . . [N]one of the information . . . collected to date suggests that the clay strata constitute a valuable deposit of potassium[.]”).

CVM objects to BLM’s decision to reject its permit application on the basis that CVM had failed “to *prove* the existence of . . . potassium” underlying the public lands encompassed by its application.^{36,37} SOR at 1; see Reply at 2 (“BLM may NOT require

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Armageddon in Simultaneous Mineral Operations?, 28 Rocky Mtn. Min. L. Inst. 79 (1983).

³⁶ CVM states that WLC filed its own PPA, NVN-087166, for potassium “in the same area” as CVM’s application on Dec. 18, 2009, and, in 2010, stated, in connection with a Canadian stock exchange public filing, “its belief . . . that . . . potassium exists in the subject lands in amounts between 3.5% and greater than 5% potassium.” SOR at 2. Later, in a Jan. 27, 2012, public filing, WLC is said to have valued the potassium “at \$1 billion for a 20-year life of mine.” *Id.* at 3. CVM further states that WLC has, over (continued...)

the prospector to prove at the outset that which a prospecting permit is designed to accomplish”).

While the Deputy State Director certainly commented on whether potassium was found in sufficient qualities and quantities to constitute a commercially valuable deposit, we do not think that, in denying CVM’s permit application, he relied on whether the public lands at issue contained any potassium or potassium in sufficient qualities and quantities to constitute a commercially valuable deposit. Nowhere is that clearly stated.³⁸ Further, the Deputy State Director did not deny the application

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the years, generally maintained that it intends to mine potassium as a by-product of mining operations, under its mining claims. *See id.* at 2, 3, 4.

BLM responds that, having reviewed all of the information cited by CVM, it concluded that potassium is not found in qualities and quantities sufficient to constitute a commercially valuable deposit. *See Answer* at 12-13. WLC states that, although its permit application encompassed, *inter alia*, all of secs. 8 and 9 and the N½ sec. 16, it withdrew the application by letter dated Apr. 18, 2013, further noting that it essentially agrees with BLM’s assessment regarding the absence of potassium, based on the results of its drilling efforts and other information. *See Brief* at 3-4, 5-6, 8-9, 11-12, 15-17, 18 (“[P]otassium grades of 5% and even higher are not economic”). We need not resolve this dispute.

³⁷ CVM also argues that potassium is, in fact, found in sufficient qualities and quantities to constitute a commercially valuable deposit, and so to support issuance of a PRL. *See SOR* at 1, 2, 6; *Reply* at 2-3, 4 (“CVM believes these clays *are* a valuable deposit of potassium and can be mined and sold. Indeed, CVM has found a market and secured prospective sales for these products.”), 6, 7. Since we are not here concerned with whether CVM has justified issuance of a PRL and issuance of a prospecting permit does not depend on whether potassium is found in sufficient qualities and quantities to constitute a commercially valuable deposit, we do not address whether potassium is found in sufficient qualities and quantities to constitute a commercially valuable deposit.

³⁸ CVM objected to BLM’s requirement that it prove the existence of potassium in the public lands at issue by relying on a statement by the Deputy State Director, at page 6 of his Decision. *See SOR* at 6. However, while the statement reflected BLM’s conclusion regarding what CVM had failed to show, the lack of a showing related not to the presence of potassium deposits upon which CVM relied, but rather to the presence of “the deposits *targeted by WLC’s* proposed and approved activities,” and so
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in its entirety, but only to the extent that CVM's proposed exploration operations "coincide[d]" with WLC's approved exploration operations and proposed mining operations. Decision at 6, 7. We, therefore, think that BLM was concerned with whether CVM's operations would materially interfere with WLC's operations, which was the avowed reason for denying the application, rather than whether CVM sought to explore for non-existent or limited quantities of potassium, which purported to infect the entire application.

In any event, whether a commercially valuable deposit of potassium exists on the public lands and the lands are chiefly valuable for potassium affects whether, at the conclusion of exploration operations under an approved prospecting permit, CVM is entitled to a PRL under Subchapter IX of the MLA. See *Harry E. McCarthy*, 128 IBLA at 40, 42. A prospecting permit is issued for the precise purpose of affording the permit applicant an opportunity to assess the presence of a commercially valuable deposit of potassium and whether the land is chiefly valuable for potassium, justifying issuance of a PRL. See 43 C.F.R. §§ 3501.10(a) ("[A prospecting permit] lets you explore for leasable mineral deposits on lands where BLM has determined that prospecting is needed to determine the existence of a valuable deposit") and 3505.10(a); *Stanford R. Mahoney*, 12 IBLA at 386 ("*[T]he essential concept of prospecting permits is to enable the permittee to seek to discover commercial deposits which are unknown.* To pre-judge what the permittee will find if the permit is allowed is to foreclose the possibility that his effort might disclose mineralization which is unknown[.] . . . This defeats the basic intent of the statute. Such prejudgment of the result should be applied only in cases where knowledge of the mineralization is so conclusively established that it can be anticipated with near absolute assurance." (Emphasis added)), 387; BLM Answer at 12 ("Appellant acknowledges, as it must in order to obtain a prospecting permit, that it is unknown whether the subject lands contain a valuable deposit of potassium"). Issuance of a prospecting permit does not hinge on a showing that potassium has already been found in such qualities and quantities that issuance of a PRL is appropriate. We do not think that it is proper to deny a PPA on the basis that potassium has not yet been found in such qualities and quantities that issuance of a PRL is appropriate.³⁹

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whether such deposits were of locatable, rather than leasable, minerals. Decision at 6 (emphasis added). BLM concluded that CVM had failed to show that the *hectorite and lithium* were "not locatable," under the General Mining Law. *Id.*; see BLM Answer at 8; WLC Brief at 10, 12-13.

³⁹ BLM may, however, reject a potassium PPA on the basis that, given what is already known about potassium, exploratory work is not necessary to determine its existence (continued...)

Finally, we note that CVM appears to have raised the question of whether the mineral found in the clay stratum constitutes a mineral locatable under the General Mining Laws. See Reply at 5 (“CVM believes that WLC has not provided to BLM economic, scientific and technical information of this clay which demonstrates that it has value as a locatable mineral”). It is unclear whether CVM means the hectorite or the lithium. In any event, both hectorite and lithium are minerals targeted for exploration and/or mining by WLC, and are presumably used to support the validity of WLC’s unpatented mining claims.

In order to properly support the mining claims, the minerals must first be locatable under the General Mining Laws. See, e.g., *United States v. Union Carbide Corp.*, 31 IBLA 72, 84 I.D. 309 (1977) (locatable versus leasable); BLM Answer at 8 (“The obvious inference of Appellant’s position was that, since the deposit [targeted by WLC] is not subject to location under the mining laws, WLC’s mining claims are invalid”). However, any challenge to the locatability of these minerals, and, therefore, the validity of WLC’s mining claims, is determinable only following a hearing in accordance with the Administrative Procedure Act, which is initiated by the bringing of a Government contest, pursuant to 43 C.F.R. § 4.451. See, e.g., *Bruce W. Crawford*, 86 IBLA 350, 376, 92 I.D. 208, 222 (1985); *United States v. Union Carbide Corp.*, 31 IBLA at 76-79, 84 I.D. at 311-12 (mining claim contest challenging zeolite mineral as locatable under the General Mining Laws or leasable under the MLA); *Arthur L. Rankin*, 73 I.D. at 313-14. However, the Department is not required to adjudicate the validity of WLC’s mining claims in order to adjudicate CVM’s PPA. See BLM Answer at 8 (“Appellant contends that . . . [‘]a showing [that the deposits targeted by WLC are not locatable] on [the] part of CVM is NOT required for the grant of a prospecting permit.’ SOR at 6. BLM agrees.”). Therefore, we decline to address the question of whether the hectorite or lithium is locatable under the General Mining Laws, in the context of the present adjudication of CVM’s PPA.

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or workability in the lands subject to the PPA. See, e.g., *Elizabeth B. Archer*, 102 IBLA at 315 (workability of phosphate deposit); *Vanderbilt Gold Corp.*, 126 IBLA 72, 73-74 (1993) (workability of hardrock mineral deposit); *Stanford R. Mahoney*, 12 IBLA at 386 (existence of phosphate deposit); *Clear Creek Inn Corp.*, 7 IBLA at 213-14, 218-20, 79 I.D. at 577-78, 580-81 (workability of coal deposit). Despite the considerable information obtained by WLC regarding potassium in the lands encompassed by CVM’s PPA, BLM did not clearly reject the application on this basis. Nor did BLM reject the application on the basis that it is appropriate to defer adjudicating the application pending receipt of further information regarding the underlying mineral deposit by other means. See *Clear Creek Inn Corp.*, 7 IBLA at 221, 79 I.D. at 581-82.

We therefore conclude that, in his April 2013 decision, the Deputy State Director failed to justify denying CVM's potassium PPA, NVN-087015, to the extent it potentially interfered with WLC's proposed and approved exploration and mining operations, under its unpatented mining claims.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is set aside and the case is remanded to BLM for further action consistent herewith.

_____/s/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
James F. Roberts
Administrative Judge